INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXIX, NO. 12 **April 5, 2002**

CRIMINAL LAW ISSUES

ROBERTSON v. STATE, No. 49S02-0103-CR-157, ___ N.E.2d ___ (Ind. Mar. 27, 2002). DICKSON, J.

The defendant, Jimmy Robertson, was convicted in a bench trial of carrying a handgun without a license as a class A misdemeanor [footnote omitted] for the possession of a weapon in the common hall outside the door to his apartment. Considering the area immediately outside a person's apartment to be part of his dwelling, and that it is thus permissible to possess an unlicensed handgun in this area, the Court of Appeals reversed. Robertson v. State, 740 N.E.2d 574 (Ind. Ct. App. 2000). We granted transfer, 753 N.E.2d 7 (Ind. 2001), and now affirm the trial court, concluding that this interpretation of the statute is incorrect.

. . . .

The statute defining the charged offense provides:

> [A] person shall not carry a handgun in any vehicle or on or about his person, except in his dwelling, on his property or fixed place of business, without a license issued under this chapter being in his possession.

Ind.Code § 35-47-2-1. The defendant claims that his place of arrest fits within the statutory definition of dwelling as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." Ind.Code §35-41-1-10. He also argues that common areas such as enclosed hallways and stairways of an apartment house have been held not to be public places.

The issue in this case is not whether the common hallway where the defendant was arrested was a public place, but whether it was the defendant's dwelling or property. The defendant does not present cogent argument that it was his property, but does assert that it was his dwelling. Observing that people treat "the area immediately outside of his or her apartment home as his or her curtilage," the Court of Appeals concluded that such area was part of the person's dwelling, but expressly declined to decide the exact parameters of what this was to include. Robertson, 740 N.E.2d at 576.

The doctrine of curtilage is not applicable here. In Indiana Code § 35-41-3-2(b) & (c), which protects a person from criminal liability when force is used to protect their "dwelling *or* curtilage" (emphasis added), the concept of curtilage is treated as separate and distinct from dwelling. In the statute proscribing carrying a handgun without a license, however, a person's dwelling is designated as an exception without also including curtilage. In addition, while "dwelling" is defined as "a person's home or place of lodging," Ind.Code § 35-41-1-10, the legislature cannot have intended to permit the carrying of unlicensed

handguns in all apartment common areas that a person may claim as part of their place of lodging. This construction could arguably extend the dwelling exception to include all the common halls in an apartment building, its entryways, elevators, parking garages, and common facilities provided for tenant laundry, mail, and other conveniences.

To foster application of the statute in a fair, consistent, and predictable manner, consistent with legislative intent, we hold that "dwelling" does not include the common areas serving a person's apartment.

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SHEPARD, C. J., BOEHM, and SULLIVAN, JJ., concurred.

RUCKER, J., filed a separate written opinion in which he dissented, in part, as follows:

I am troubled that Robertson is transformed from a law-abiding citizen one moment into a misdemeanant the next by merely stepping a few feet outside his doorway while the handgun is still in his possession. From my perspective the Court of Appeals has the better view: "the area immediately outside of a person's apartment is a part of that person's dwelling." [Citation omitted.] . . .

SMITH v. STATE, No. 48S00-0009-CR-550, ___ N.E.2d ___ (Ind. Apr. 2, 2002).

BOEHM, J.

In this direct appeal, Smith contends the State was judicially estopped from seeking an instruction on accomplice liability because it agreed to a guilty plea from another defendant on a theory of the facts that was allegedly inconsistent with Smith's being an accomplice to the killing. . . . We hold that judicial estoppel based on an inconsistent position in an earlier case does not apply against the State in a criminal case where the parties to the two actions are not the same.

. . . .

Smith contends that because the State accepted Lampley's guilty plea under Indiana Code section 35-44-3-2, which has been interpreted to apply to people who did not actively participate in the crime itself, but who assisted a criminal after he or she committed a crime, [footnote omitted] the doctrine of judicial estoppel precluded an instruction in Smith's trial that was based on Smith's aiding Lampley in the killing.

Smith correctly points out that judicial estoppel has been held to prevent a party from asserting a position in a legal proceeding inconsistent with one previously asserted. [Citation omitted.] However, judicial estoppel in this state has been applied only in civil cases, and neither this Court nor the Court of Appeals has applied the doctrine against the State in a criminal case. A few criminal cases have noted the claim that judicial estoppel precluded the State from asserting a particular contention, but in each case the elements of estoppel were found wanting. As a result, none of these decisions considered whether the doctrine may be invoked against the State in a criminal case. [Footnote omitted.] . . .

. . . .

We think the purpose of judicial estoppel is not well served by applying it against the government in criminal cases. [T]he government possesses unique status as a litigant and enjoys a great degree of latitude in prosecuting the law and striking plea bargains. The purpose of judicial estoppel is to protect the integrity of the judicial process rather than to protect litigants from allegedly improper conduct by their adversaries. [Citation omitted.] It does so by preventing a party and its counsel from playing fast and loose with the courts. [Citation omitted.] We do not believe the acceptance of a plea bargain from Lampley on one theory of the case and the prosecution of Smith in a separate action on an alternate theory can be construed as "playing fast and loose" with the courts.

Perhaps more importantly, if, after one defendant is convicted, additional evidence becomes available suggesting the guilt of a second, but on an inconsistent theory, some type of relief may or may not be afforded the first defendant under existing doctrines of law. Immunization of the second defendant due to a mistake in the prosecution of the first,

however, is not the appropriate remedy. Accordingly, we hold that where the parties to the criminal proceedings in question are not identical, judicial estoppel does not apply against the State. Here the alleged inconsistency is between the State's position in this case and its "prevailing" by obtaining a guilty plea on an inconsistent theory in Lampley's. We leave for another day the issue of whether judicial estoppel can be applied against the State in a criminal case if the parties in the prior suit are the same, i.e., in a subsequent prosecution of the same defendant.

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SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

BRADLEY v. STATE, No. 65A01-0106-CR-236, ___ N.E.2d ___ (Ind. Ct. App. Mar. 22, 2002). KIRSCH, J.

[I]n *Hatcher v. State*, 762 N.E. 2d 170 (Ind. Ct. App. 2002), a panel of this court faced the same issue. In determining whether the General Assembly intended to create an exception for individuals who manufacture methamphetamine for their own use, Judge Mattingly-May wrote that "[t]he legislature could not have intended to enact a statute allowing one to be subjected to criminal liability for possession of the ingredients of methamphetamine, but to be excluded from liability if the ingredients were used to manufacture the finished product." *Id.* at 173. The court noted that the legislature could not have intended to create the "absurd result" that an individual can permissibly manufacture methamphetamine for his personal use. *Id*.

However, we find the reasoning employed by Judge Sullivan in his concurring opinion in *Hatcher* persuasive. We agree that the "clear language" of the statute controls and that "[w]e cannot avoid the legislature's obviously conscious choice of words in drafting the statute." [Citation omitted.] As Judge Sullivan noted: "The General Assembly is not constitutionally, or otherwise, prohibited from enacting extremely poor public policy into law. . . . [W]e conclude that the statute must be given a reasonable construction so as to give effect to the intent of the legislature, rather than straining the interpretation to the point of defeating legislative intent. Because the statute is clear that preparation or compounding of a controlled substance for personal use is exempted from the definition of "manufacture" as then used in IC 35-48-1-18, we hold that Bradley could be convicted of the crime of possession of chemical reagents with the intent to manufacture methamphetamine only if the State proved that the intent to manufacture methamphetamine was not for his personal use.

. . . .

ROBB and SULLIVAN, JJ., concurred.

YOUNG v. STATE, No. 54A01-0109-CR-333, ___ N.E.2d ___ (Ind. Ct. App. Mar. 28, 2002). KIRSCH, J.

The State points to its April 6, 2000 motion requesting that the trial court reset Young's trial date, which provided in part:

> "Comes now the State of Indiana . . . and respectfully requests the Court to reset [Young's trial] which was not heard on April 4, 2000, due to the congested court calendar and the trial of State of Indiana vs. Glen Grady, Cause Number 54C01-9908-CF00076."

Appellee's Appendix at 1. The CCS reveals that after receiving this motion, the trial court reset Young's trial date. However, this motion does not conform to any of the requirements of the rule. The motion was not denominated a motion for continuance; it was not made at least ten days prior to the trial date, but was actually made *after* the date the trial was scheduled; and finally, it does not contain a statement that the tardiness in filing was not

the result of the prosecutor. Accordingly, we find that the State's motion was inadequate to comply with Criminal Rule 4(A) and (C).

. . . .

[T]he trial court is not without constraints when continuing a criminal case by "taking note" of court congestion. Criminal Rule 4 imposes certain requirements when a trial court, without a proper and timely motion, continues a trial date sua sponte because of court congestion. Criminal Rule 4(A) and (C) provide that "[a]ny continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time." Crim. R. 4(A) and(C). Thus, a written order is generally a prerequisite for the tolling of the Criminal Rule 4 timetable in a criminal case that has been continued by the trial court "taking note" of court congestion.[6]

In the present case, the trial court failed to issue an order and the docket is silent as to why Young's trial did not commence on April 4, 2000. . . .

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[6] Although not required by our criminal rules, we encourage trial courts to also note in the CCS or docket the reason why a criminal case is continued. We have previously stated that a trial court speaks through its docket which makes it necessary for the trial court to make a docket entry as to why a defendant's trial cannot be conducted on the date set. *Staples*, 553 N.E.2d at 143. By noting in the CCS or docket the reason why a criminal trial is continued, a trial court not only furthers the goal of proper case management but also facilitates later appellate review. Further, because the CCS is a means for attorneys to view the progression of a criminal case and applicable dates, it would seem better practice for such notations to be made in the CCS or docket so that both the State and criminal defense attorneys would have an easier means of calculating the Criminal Rule 4 timetable as applied to the facts and circumstances of each case.

SULLIVAN, J., concurred.

ROBB, J., filed a separate written opinion in which she dissented, in part, as follows:

It is apparent from the record that the trial court continued Young's criminal case by "taking note" of court congestion. However, the trial court failed to adhere to the prerequisite for the tolling of the Criminal Rule 4 timetable in a criminal case which has been continued by the trial court "taking note" of court congestion. . . .

However, I believe that the facts and circumstances support the finding that the trial court adhered to the mandates of Criminal Rule 4. The State's April 6, 2000, motion references the fact that the trial court calendar was congested on April 4, 2000, and that said congestion was the result of a different trial commencing on that date. [Citation to Brief omitted.] . . . I have no doubt that the trial court relied upon the State's motion when resetting Young' criminal trial for June 13, 2000. It follows that Young's trial did not commence on April 4, 2000, because of court congestion as referenced in the State's motion. Therefore, I find that the substance of the State's motion was essentially "adopted" by the trial court when it continued Young's criminal trial. . . . I believe that the Criminal Rule 4 timetable for bringing Young to trial was tolled for the period from April 4, 2000, to June 13, 2000, a total of seventy days.[8]

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[8] Although I believe the facts and circumstances of the present case support the inference that the trial court essentially "adopted" the substance of the State's motion to reset when continuing Young's trial, I do not condone this practice and strongly encourage a trial court to enter its own order when continuing a criminal trial by "taking note" of court congestion. Because of the simple nature of such court orders, I do not deem such a requirement that a court enter an order explaining the reason for continuing a criminal trial unduly oppressive. A trial court's strict adherence to the procedural dictates of Criminal Rule 4 in granting a continuance will help prevent future problems at both the trial and appellate level. Nonetheless, under the facts and circumstances of this case, I believe find that the Criminal Rule 4 timetable for bringing Young to trial was tolled for the period from April 4, 2000, to June 13, 2000.

CIVIL LAW ISSUES

ESTATE OF PASSMORE v. LEE ALAN BYRANT HEALTH CARE FACILITIES, INC., No. 61A01-0108-CV-286, ___ N.E.2d ___ (Ind. Ct. App. Mar. 27, 2002).

MATHIAS, J.

As part of Parke County's hiring process, they mailed a "Request for Employment Reference" form to LAB regarding Richardson's employment history with LAB. Richardson had signed the form, authorizing LAB to release all information regarding his work record and performance. [Footnote omitted.] . . .

. . . .

The Complaint alleged that LAB "affirmatively misled and misrepresented the employee as a good employee[,]" even though, the Complaint alleged, the employee had engaged in improper sexual activity with residents at LAB, and LAB's management and staff were aware of the conduct. [Citation to Brief omitted.] The Complaint continued to allege that Parke County relied upon LAB's alleged misrepresentations in making its decision to hire the employee and that LAB made such misrepresentations "with knowledge of the substantial certainty that [the employee's] conduct would continue at Parke County Nursing Home, and with reckless disregard of the near certainty that such conduct would result in harm and injury to female residents of the Parke County Nursing Home facility." [Citation to Brief omitted.]

. . . .

Passmore argues that this court should adopt the principals of conscious misrepresentation and negligent misrepresentation as outlined in Restatement (Second) of Torts, Sections 310 and 311. LAB argues and Passmore admits however, that the current state of tort law in Indiana only recognizes the tort of negligent misrepresentation as outlined in Restatement (Second) of Torts, Section 552, and only under very limited circumstances.

Sections 310 and 311 allow third parties to recover from a person who has made a misrepresentation inducing action that involves a risk of physical harm. Restatement (Second) of Torts, Section 310, Conscious Misrepresentation Involving Risk of Physical Harm, provides that:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
> (b) knows
> (i) that the statement is false, or
> (ii) that he has not the knowledge which he professes.

Restatement (Second) of Torts, Section 311, Negligent Misrepresentation Involving Risk of Physical Harm, provides that:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
> (a) to the other, or
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
> (2) Such negligence may consist of failure to exercise reasonable care
> (a) in ascertaining the accuracy of the information, or
> (b) in the manner in which it is communicated.

Section 552, Restatement (Second) of Torts is similar to Section 311 because both sections impose liability for negligent misrepresentation. However, Section 552 differs from

both Sections 310 and 311 because Section 552 requires a far more direct relationship between the parties involved and remedies pecuniary loss, rather than actual or potential physical harm. . . . [I]ndiana has not recognized the tort of conscious or negligent misrepresentation under Sections 310 or 311, and has only recognized Section 552 under limited circumstances, which are dissimilar to our case.

. . . .

Additionally, Indiana has recognized negligent misrepresentation under Section 552 only in the very narrow area of employment law when an employer breaches a duty to an actual or potential employee by making a false representation upon which the employee reasonably relies to his or her detriment. [Citation omitted.] Even the Eby [v. York-Div., Borg-Warner, 455 N.E.2d 623 (Ind. Ct. App. 1983)] court refused to extend employer liability to all foreseeable plaintiffs. [Citation omitted.] . . .

We can find no Indiana cases that adopt Restatement (Second) of Torts, Sections 310 or 311, or a rationale under Indiana common law for doing so.

. . . .

BROOK, C. J., concurred.

RILEY, J., filed a separate written opinion in which she dissented, in part, as follows:

I respectfully dissent. The central issue is best stated by the appellants in this case: does a nursing home owe third persons a duty not to make material misrepresentations in the course of making employment recommendations, when a substantial risk of physical harm to third persons by the employee is foreseeable.

. . . .

[I] find, consistent with the Indiana common law and the RESTATEMENT (SECOND) OF TORTS §§ 310 and 311, that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third person.

KENNEDY v. GUESS, INC., No. 29A02-0110-CV-674, ___ N.E.2d ___ (Ind. Ct. App. Mar. 28, 2002).

BAILEY, J.

On November 22, 1996, Kaye purchased a watch at a Lazarus Department Store in Indianapolis, Indiana. She received an umbrella as a free gift with the watch purchase. Both the watch and the umbrella bore a "Guess" logo.

On May 22, 1998, Richard took the umbrella to his place of employment. One of his co-workers began to swing the umbrella. The shaft separated from the handle, flew through the air and struck Richard in the nose and sinus, causing injury.

On May 26, 1999, the Kennedys filed an Amended Complaint for Damages including negligence and strict liability claims against Guess, Callanen, Interasia Bag and Interasian Resources. Callanen, a Connecticut corporation, possesses the right to market products bearing the Guess name under the terms of a licensing agreement with Guess, a California corporation. Interasia Bag, a Hong Kong corporation, apparently manufactured the Kennedys' umbrella. Interasian Resources, located in New York, apparently is a domestic affiliate of Interasian Bag.

. . . .

The Kennedys also brought a product negligence claim, alleging that the defendants were "negligent in the design, manufacture, assembly and testing of the umbrella." [Citation to Brief omitted.] . . .

. . . .

Callanen and Guess have contended that they owed no duty to the Kennedys, because neither manufactured the umbrella. The trial court agreed. . . .

The Kennedys claim that a duty is imposed upon Callanen and Guess by the provisions of the Restatement of Torts (Second), § 400, as follows:

> One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.

This Court adopted the foregoing provision as the law in Indiana in Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 224, 279 N.E.2d 266, 273 (1972), and explained the rationale supporting the adoption of § 400 as follows:

> [A] vendor is liable not only for his own negligence but also for any negligence on the part of the actual manufacturer, even though the vendor could not reasonably discover the defect. . . . The reason for imposing such liability is not hard to find. When a vendor puts his name exclusively on a product, in no way indicating that it is the product of another, the public is induced to believe that the vendor was the manufacturer of the product. . . .

[Citation omitted.] Guess argues that, regardless of financial benefit garnered from the use of its trademark, section 400 is inapplicable to it, because it merely licensed the use of the trademark. Callanen argues that section 400 is inapplicable to it, because the trademark affixed at its instance was not its own and its only role was that of distributor. We are not persuaded that section 400 should be interpreted so narrowly. . . .

Callanen and Guess argue that more than merely affixing a trademark should be required for the operation of section 400, quoting the observation of the Connecticut Supreme Court that, although "a nonmanufacturer may under certain circumstances be held liable in the same manner as a manufacturer or seller of a defective product, . . . most cases impose liability [under section 400] only after finding that the licensor had a significant role in the chain of distribution." Burkert v. Petrol Plus of Naugatuck, Inc., 579 A.2d 26, 33-34 (Conn. 1990). . . . The Burkert Court observed that the "apparent manufacturer" doctrine of section 400 had been applied to trademark licensors "with no additional involvement in the stream of commerce" only in isolated cases,. . . . The Court also explained that, in jurisdictions where pure trademark liability is not imposed and "additional involvement" is required, determination of adequate involvement in the stream of commerce such that an entity is an "apparent manufacturer," ordinarily presents a question of fact that may be resolved by examination of such factors as the licensor's right of control over the product design, the fees received for the use of the trademark, the prominence of the trademark, supply of components, participation in advertisement and the degree of economic benefit to be gained from the licensing agreement. [Citation omitted.] . . .

We do not read Dudley and Lucas [v. Dorsey Corp., 609 N.E.2d 1191 (Ind. Ct. App. 1993)] as imposing "pure" trademark liability. . . . However, even where pure trademark liability is not imposed and participation in the stream of commerce is required before a duty of care is recognized, a question of fact remains as to whether Guess or Callanen or both exercised the requisite degree of involvement in the stream of commerce to be considered an apparent manufacturer.

Nevertheless, Callanen and Guess urge this Court to adopt the Restatement (Third) of Torts § 14, providing that the apparent manufacture doctrine does not apply to trademark licensors. We conclude that the rationale of Dudley has continuing viability in the contemporary marketplace. Where one labels a product as a "designer label" product and places it into the stream of commerce, the consumer is induced to believe that the product he receives is of a superior quality. Here, the consumer had no readily available means of ascertaining that the actual manufacturer of his product was a foreign corporation, arguably outside the jurisdiction of Indiana courts.

The exclusivity of the trademark would likely have led a reasonable purchaser to believe that the licensor had put out the item as its own product. Essentially, if Callanen or Guess had sufficient involvement with the product such that they placed the umbrella into the stream of commerce, identifying the product as their own, they have "vouched" for the product. [Citation omitted.] Moreover, they cannot exploit the economic benefits derived from the licensure of the trademark and, in turn, ignore the consequences of defective products associated with the trademark name. Accordingly, Callanen and Guess have not demonstrated their entitlement to judgment as a matter of law on the Kennedys' product negligence claim.

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DARDEN and SHARPNACK, JJ., concurred.

CASE CLIPS is published by the
Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
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